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European Criminal Perspectives on the Right to a Fair Trial

„The end of law is not to abolish or restrain but to preserve and enlarge freedom. For in all the states of created beings capable of law, where there is no law, there is no freedom.’

John Locke (1632-1704)

As John Locke so aptly put it the end of law is to, 'preserve and enlarge freedom', by this we should understand that the Member States should not be allowed to act outside of the remit of the law concerning the implementation of the criminal procedural law in matters concerning the Right to a Fair Trial. All matters should be regulated by the law at all times and Member States should be further encouraged to act inline with their obligations under the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR) as well as the European Charter of Fundamental Freedoms (hereinafter referred to as the Charter). These obligations have a further support in light of the changes that the Treaty of Lisbon has brought about with regards to human rights protections and Member States should be encouraged to implement in full the Directives of the European Union and not to diverge or derogate.

It will be discussed below that it is important that the formulation of the law as well as the punishing of people should not be conducted outside of the law. The ultimate goal (and that states should see it as being just so) should be to 'preserve and enlarge freedom'. However, this is sadly not always the case and as such the question presents itself of what should the function and the role of the criminal procedural law be to 'preserve and enlarge freedom'?

Introduction

This paper seeks to outline the significance of the Treaty of Lisbon in tandem with the Stockholm Programme in fostering an environment of mutual recognition and trust amongst the Member States. Particular attention will be paid to the European Arrest Warrant (hereinafter referred to as the EAW) and how it is testing the boundaries of the cooperation between Member States. Reference will be made to the Treaty of Lisbon and the significant role it has played in the furtherance of the formal protection of human rights and fundamental freedoms by making it so

the Member States have to sign up to the ECHR. What is of particular importance in light of the Treaty of Lisbon is the fact that it gives power to, 'the EU to adopt measures in the area of criminal law to strengthen the rights of EU citizens, in line with the Charter, particularly the rights of individuals in criminal procedures.'¹ This paper will also address the nuanced aspects, which are raised by the right to counsel forming part of the right to a fair trial. The right to counsel receives varying levels of support throughout the European Union (EU). In addition to this particular attention is given to the right to a fair trial in the context of the application of the EAW on non-terrorist suspects. This paper further argues that the EAW poses the greatest challenge to the cohesive workings of the Court of Justice of the European Union (hereinafter referred to as the CJEU) and the European Court of Human Rights (hereinafter referred to as the ECtHR). The judgments of both the Courts will be instrumental in securing the protection of fundamental rights of those subjected to EAWs. Additionally, this paper will discuss the constitutional theories, which underpin the development of the rule of law and due process in maintaining a democratic society with particular emphasis being placed on the right to a fair trial. Bearing in mind the relevant domestic provisions attention will also be given to the ECHR Article 6 (3) (c) as well as the Charter Article 47. Attention will be given to how Article 6 (3) (c) has been incorporated by the Member States.

In light of the recently drawn up Hungarian Basic Law, its section XXVI. Article 3 (3) with relation to the right to be defended at all stages of the proceedings will be addressed in light of the right to fair trial protections currently, theoretical present in Hungary. In addition attention will be given to the relevant and most pertinent case law of the ECtHR, (*Salduz v Turkey* (Application No. 36301/02) amongst other cases which will also be discussed) and how these cases act as signposts on the route towards securing the right to counsel for all.

In light of the discussion of the relevant case law it will be asserted that one can no longer talk about the concept of 'Justice wide open', rather it is more appropriate to speak in terms of 'Justice wide shut'. This reformulation of a fairly well known catchphrase has been in response to the recent catalogue of both ECtHR judgments which illustrate the fact that several Member States are far from fair trials.

E.U. criminal procedural development in the 21st Century has taken a new turn and it is now about finding a common procedural system across the borderless Europe. This has opened up a multitude of problems. It is asserted that the European Council has been trying to regain the ground that it has lost to the EAW via the Stockholm Programme. The assertion of this paper is that the E.U. is heading in the right direction but the question remains as to whether or not the Member States will keep with the programme in the sense that they will choose to work towards a common good of commonly agreed upon criminal procedural standards as well as safeguards at both the pre trial and in trial stages.

In this paper particular focus will be given to the right to a fair trial and the right to legal counsel and the relevant information in a trial.

It will be argued that in the aftermath of September 11 and the quick rush through of legislation, it was not noted what the serious pitfalls could be especially of the EAW Framework Decision, it will be asserted that the European Commission is now trying to patch over those

¹ European Commission to guarantee suspects' rights to speak with a lawyer, inform family of arrest', European Commission-Press Release, <http://tinyurl.com/6lmu6x9> (2012. 07. 02)

looming and huge crevices that the EAW has made, one of those being that it has forced to the front the tension that the criminal procedural practices of the various Member States is considerably divergent. In light of this the Stockholm Programme which runs from 2009-2014 and within this ambit will bring about 6 Directives which are aimed at the harmonization and the bringing together of these considerably divergent criminal procedure practices in the various Member States. As with all debates concerning the application as well as the adherence to human rights is to encourage that not only the “bare minimum” are adhered to but that in actual fact the Member States are encouraged to go the extra mile when it comes to ensuring human rights for all those within its borders.²

So with this in mind we will examine the relevant development of the case law in this field of the EAW Framework Decision as well as the Constitutional practices and principles of the Member States when it comes to enshrining and developing this concept.

The Right to a Fair Trial is embedded in Articles 47 and 48 of the EU Charter of Fundamental Rights as well as in Article 6 of the European Convention on Human Rights and Fundamental Freedoms. It is now to these principles that we will turn.

Key Conceptualizations

When considering the right to a fair trial it is not only the articles that stipulate the rights but also the concepts which have developed over time in the jurisprudence which have now been ‘read in’ to some extent into this instruments.

Namely the concept of the equality of arms is one such example which is provided for and protected as the bedrock of adversarial trial procedure. The protection of this principle is paramount to ensuring that however as we will see below the parity of the parties both in the pre trial and in trial stages leaves much room for improvement.

In addition to this due process then becomes a talking point because when one aspect of the securing of the right to a fair trial is infringed then the process itself is called into question. Due Process has become something which sometimes appears to be treated as a mere luxury.

In light of both of the importance of this principles comes another one, the right to counsel, which is one of the most frequently infringed rights as most Member States have stipulated certain circumstances as well as time limits within which an individual can and should be provided with a lawyer. This right has recently been taken on by the European Commission in its draft proposal directives. This draft proposal directive is the center of debate by the Member States as to whether or not its conditions are reasonable and or too far reaching. This particular draft proposal directive and its interaction as well as its possible impact upon those being subjected to an EAW will be the topic of this paper. The tension of being able to mount a proper and effective defence as well as understanding the charges which are being brought against you which is often pitted against the right of the State to protect its nationals will be addressed with particular view to the fact that the current legislation on terrorism in place both on the domestic legislation in Member States as well as at the more regional European level are being misapplied and hence not being used for what they were originally conceived.

In the midst of these developments stand the ECHR and the Charter which should act as

² Is The Rule Of Law Really Indifferent To Human Rights? By Evan Fox-Decent, *Law and Philosophy* [2008] 27: 533-581 page 534.

beacons for the Member States when choosing the methods by which they bring about and apply their domestic legislation

Article 6 of the ECHR provides that:

'3. Everyone charged with a criminal offense has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and the facilities for the preparation of his defence; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court' (*italics and emphasis added*)³

Articles 47 and 48 of the EU Charter further build upon and expound these principles and rights:

Article 47 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.⁴

Article 48 Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.⁵

Whenever mention is made to Article 6 and or Articles 47 and 48 it will be in relation to the above principles.

The Stockholm Programme (2009-2014)

The Stockholm Programme and the Lisbon Treaty do go hand in hand. The Lisbon Treaty gives the Stockholm Programme support as well as giving it its legal foundation to which Member States can be directed to and this can remind them of their obligations to uphold the Treaty rights.⁶ The Lisbon Treaty give teeth to (the bite) of the strategic guidelines of the Stockholm Programme.

The Stockholm Programme further builds upon the Treaty of Lisbon by creating a plan until 2014. This Stockholm Programme furthers the initiative of the European Criminal Law in the area

³ <http://www.hri.org/docs/ECHR50.html#C.Art6> (2012. 07. 02)

⁴ http://www.europarl.europa.eu/charter/pdf/text_en.pdf (2012. 07. 02)

⁵ Ibid.

⁶ Viviane Reding Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, „Towards a European Area of Fundamental Rights: The EU's Charter of Fundamental Rights and Accession to the European Convention on Human Rights" (Interlaken, 18 February 2008).

of freedom, security and justice.⁷ In the Commission's most recent communication for the next five years, (within the AFSJ) that they will need to respect subsidiarity meaning that criminal cooperation should be sought in close cooperation with the European Parliament, national parliaments and the Council and the focus is acknowledged as being on the mutual recognition and the harmonization of offences and sanctions (as mentioned above).⁸

The objective of the Stockholm Programme as with the Treaty of Lisbon is to see justice served and to see and have those who are sought by the law to be brought before the right jurisdiction. The Treaty of Lisbon in conjunction with the Stockholm Programme aims to remedy the previous unsuccessful attempts of approximating the criminal justice systems of the Member States.⁹ The Stockholm Programme sets out to achieve (as set out in its roadmap) cohesion in the substantive criminal law by creating a 'Europe of Law and Justice'¹⁰ and a 'Europe that Protects'¹¹ the programme aims to achieve this by creating an environment of mutual trust and recognition. It is reiterated throughout the Stockholm Programme that in order for the overall aims to be achieved the judiciary and the police forces of the member states must be encouraged to work together to achieve this unification of the criminal justice systems.

„an area of freedom, security and justice in Europe.'¹²

This (above quote) is the remit of the Stockholm Programme and what the European Council hopes to achieve within this timeframe with the help of the Roadmap's objectives which among others is to create and foster an environment in which the Member States can reach a common agreement upon key criminal procedural matters in the Right to a Fair Trial issues.

The Stockholm Programme further builds upon the Treaty of Lisbon by creating a plan until 2014. This Stockholm Programme furthers the initiatives of the European Criminal Law in the area of freedom, security and justice. The roadmap is council resolution 15434/09 and its full title is known as the 'Roadmap for Strengthening Procedural Rights of Suspects and Accused Persons in Criminal Proceedings' one of the many aims of the roadmap is to 'expand existing standards' and to make the application of the European Convention on Human Rights and Fundamental Freedoms 'more uniform'. There is definitely overlap between the Treaty of Lisbon and the Stockholm Programme.

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⁷ The Stockholm Programme - An Open and Secure Serving and Protecting Citizens, <http://tinyurl.com/6d4cbo3> (2012. 07. 02)

⁸ Alun Howard Gibbs, „Reasoned Balance in Europe's Area of Freedom, Security and Justice", *European Law Journal* 17 No. 1 (2011) 121-137.

⁹ R.A. WESSEL, "European Constitutionalism Beyond the EU Constitution". *Antwerpen: Intersentia* (2009) 283.

¹⁰ The Stockholm Programme, 4., 12.

¹¹ Ibid. 5.

¹² Ibid.

The role of the Stockholm Programme

The aim of the Stockholm Programme is to encourage the member states to work towards the goal of achieving mutual trust in securing European criminal justice (this is set out in its roadmap).

The Stockholm Programme makes reference to the roadmap for strengthening procedural rights of suspected and the accused persons in criminal proceedings.¹³ There have been identified 10 areas of criminal law in article 83 (1) of the TFEU which the Stockholm Programme has taken on to promote in its goals.¹⁴

The Stockholm Programme was formulated to work towards a mutual criminal system in addition to the efforts of the European Commission. This programme was initiated by Sweden (2009) and supported by successive EU presidencies and is intended to: 'consolidate and complete European Union policy on justice, home affairs, asylum and migration.'¹⁵

The convergence principle: this is of vital importance when we are talking about the Member States and the bringing together of different legal systems.¹⁶ The Principle seeks to, 'bring Member States closer not only by means of standardization when necessary but also by operational means (training programs, exchange networks, solidarity mechanisms, the pooling of some equipment, etc. including all areas where closer relations between member states are possible, such as agents, institutions.)'¹⁷

Within the European Union and the foundational policies of the EU in the AFSJ they have legitimized a (so called) illusion that, 'liberty and security are similar types of concepts and therefore can be compared and weighed one against the other. Liberty is a core value of democracy, rule of law and fundamental rights that are designated to protect the liberty of individual within society. Security is not a value as such.'¹⁸

Europe, according to Tóth Judit, is now standing at the beginning of the crossroads with regards to the Stockholm programme. There are two options, one leads towards a more security minded approach driven by the 'intelligence sector, exceptional rules and half-way criminal justice' and the other approach is driven much more by 'public awareness, enhanced social welfare system, change in paradigm in security versus liberty, priorities of JHA and FSJ being in harmony with external relations, regional development, ENP, enlargement and social cohesion, integration of excluded social strata groups.'¹⁹

Four main priority areas:

Within the Stockholm programme there are listed four main priority areas which are the following

- A Europe of Rights
- A Europe of Justice
- A Europe that Protects

¹³ Ibid. 10.

¹⁴ Ibid. 14-15.

¹⁵ Ibid.

¹⁶ S. CARRUTHERS: "The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs". *European Human Rights Law Review* Issue 6 (2009) 784-804.

¹⁷ TÓTH Judit: *On the road from Hague to Stockholm and somehow ahead*. In: Ágh Attila – Kis-Varga Judit (szerk): *The global crisis and the EU responses: The perspectives of the SBH team presidency, EU-Consent 'Together for Europe Series'*, 2009. 123.

¹⁸ Ibid. 127.

¹⁹ Ibid. 129.

– A Europe of Solidarity

One of the many aims of the roadmap is to 'expand existing standards' and to make the application of the ECHR 'more uniform'. The Stockholm Programme of 2009 until 2014 views the 'roadmap' as a mechanism by which to help with the implementation of measures and that the Commission should be swift in making this happen. The aim of the roadmap is to make and „expand existing standards” and to make the application of the ECHR rights „more uniform”. There are 500 million people in Europe and 27 Member States. The Union's accession to the ECHR is a powerful tool. It is for this very reason that freedom, security and justice must be worked through in close cooperation with member states in conjunction with the roadmap. This can only be achieved by the mutual recognition of sentences when it comes to the protection of rights of the defendant.²⁰

European Union Directives

The debate

Just as the end of the WW's was a defining moment in the history of the formalization of human rights and fundamental freedoms in the Universal Declaration, so has the aftermath of September 11 albeit it could be argued for the worse in terms of the protection of the sanctity of human rights and fundamental freedoms. Just as the drafters of the UDHR wanted to draw up a document which would ensure that nothing of that level of tragedy and horror would ever happen again it has become a defining moment in our history. And in the same so has the tragedy of September 11 become a pivotal moment in our history for various reasons. Just as the WW drafters wanted to prevent anything of that magnitude from happening again so was the attitude after the terrorist attacks. With this in mind an onslaught of legislation was passed both in the USA (the Patriot Act stands out in particular), the United Kingdom (has passed several Acts in Terrorism which have been rushed through parliament in response to the terrorist attacks) and then in Europe the most significant change for our purposes is the EAW Framework Decision. All of these elements together make up an impressive patchwork of defence, defence from the evil and heightened level of security which has been conflated with justice where justice is about freedom, but freedom for who and from whom should we be asking.

Freedom, justice and security have become concepts and key terms that are thrown around in today's ongoing debate with regards to the protection of human rights and fundamental freedoms.

Within this area of the law in Europe there have been several test cases so to speak, within and amongst the various Member States. The EAW has brought these issues to the forefront.

The EAW can be defined as:

'a judicial decision enforceable in the European Union, issued by a Member State and executed in another Member State on the basis of the principle of mutual recognition.'²¹

The EAW was adopted on the 13th of June 2002 and finds its legal basis in the Council Framework Decision 2002/584/JHA (Framework Decision).²² This instrument is viewed as being

²⁰ Robin LOOF: "Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU". *European Law Journal* 12 No. 3 (May 2006) 421-430.

²¹ How to issue and send European Arrest Warrants, A Handbook, Revised and Updated on the 16th of July 2007 p. 4 <http://tinyurl.com/7nevfqa>, (2012. 07. 02)

²² Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) <http://tinyurl.com/bwlgqg4> (2012. 07. 02). The EAW Framework Decision has been

one such method of ensuring that justice is done and that people who are sought by the law are indeed brought before the appropriate jurisdictions.

The EAW has affected and pushed to the forefront the problems with justice in trials. It has highlighted the discrepancies amongst the Member States in the application of fair trial standards, this is why the third Directive on right to access to lawyers in criminal proceedings is vitally important.²³ The U.K., Netherlands, France and Belgium are dragging their feet with regards to the application and implementation of this Directive. The U.K. has opted out of this Directive despite the fact that having opted into the other two Directives which are part of the Roadmap. All Member States in 2009 recognized and committed to the fact of the Roadmap which's goal is to increase defence rights in its and consequently their Roadmap.

The EAW further highlights the necessity for ensuring the equality of arms between the prosecution and the defence the EAW applies to all extradition requests within the European Union. In its Preamble at paragraph 6 it is stated that:

„(6) The European Arrest Warrant provided for in this Framework Decision is the first concrete measure in this field of criminal law implementation the principle of mutual recognition within the European council referred to as the „cornerstone” of judicial cooperation.”²⁴

The European Arrest Warrant: Article 11:

„shall have a right to be assisted by a legal counsel in accordance with the national law of the executing Member State”²⁵

Article 11 (itself highlights the necessity for ensuring the equality of arms between the prosecution and the defence) of the Framework Decision provides for some legal defence but the Directive takes it one step further than this. Article 11 (2) and (3) of the draft Directive on access to legal counsel go beyond this, guaranteeing anyone arrested under an EAW access to a lawyer (regardless of national law) and setting out exactly what that right entails. Articles 11(2) and (3) of the draft Directive go way beyond what the EAW offers and provides in that they are guaranteeing anyone arrested under an EAW access to a lawyer (regardless of national law) and setting out what that right entails exactly.

In order for the EAW to work appropriately it is necessary for there to be a core of minimum standards to ensure that fair proceedings are set out in European Union law because without this it will not be possible to enforce European Union methods to fight crime such as the EAW.²⁶ This is where the pivotal role of both the Lisbon Treaty and the Stockholm Programme come to the force.²⁷

amended, along with other Framework Decisions by the Council Framework Decision 2009/299/JHA there amendments are all related to Acts adopted under Title VI of the EU Treaty. They are also intended to enhance the procedural rights of persons and to continue fostering the mutual recognition of court decisions between Member States in furtherance of keeping with the principles of the Right to a Fair trial [http:// tinyurl.com/bnh6wv6](http://tinyurl.com/bnh6wv6) (2012. 07. 02)

²³ O. POLLICINO: “European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems. *German Law Journal* 9 No. 10 (2008) 1313-1355

²⁴ <http://tinyurl.com/6wezow> (2012. 07. 02)

²⁵ Ibid.

²⁶ Alun Howard GIBBS: “Reasoned Balance in Europe’s Area of Freedom, Security and Justice”. *European Law Journal* 17 No. 1 (2011) 121-137.

²⁷ Robin LOOF: “Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU”. *European Law Journal* 12 No. 3 (May 2006) 421-430.

It is recognized that not all of the criminal justice systems of all of the member states will be the same but what is important is that all of the trials are exercised fairly as well as similarly and they conform with commonly agreed procedural standards (of fairness).

There have also been several cases which have been documented by the non governmental organization Fair Trials International. Fair Trials International has documented quite extensively the use of as well as especially the increased use of the European Arrest Warrant in particular for issues not related to what the EAW was originally intended for which was to help ease the process by which people could be extradited for terrorist related offenses. However, what we are seeing is a huge increase in the use of these EAWs for crimes where it is just simply inappropriate or the fact that they are being misused in their implementation see the case of Michael Turner, or the Polish case of the Polish teacher in Bristol who was sought by the Polish authorities.

Since its inception there has been a multitude of cases brought raising questions concerning the way in which the EAW should be applied.²⁸ A few of these cases have related to the instrument itself but there is a growing number of cases concerning individuals who have been made subject to EAWs wrongly. Fair Trials International (FTI) has taken up the mantle of these cases and is tirelessly fighting for the fair trial rights of those subjected to EAWs. One of the most recent examples of their work is the case of Andrew Symeou, who was extradited to Greece from the United Kingdom via an EAW²⁹. The basis for the EAW was that Andrew Symeou was responsible for murder.³⁰ The charges were based on evidence which was obtained Police intimidation as well as a strong argument that there was a mistaken identity. He spent 10 months in prison but was released on bail provided that he remain in Greece.³¹ At the trial the interpreter was so inadequate that the trial had to be halted until another one could be found. Unfortunately the directive on interpretation and translation does not have to be enacted until 2013 in the member states.³² However, four years after being extradited he was found innocent of all charges by the Prosecutor himself and released to return back to the United Kingdom.³³

In 2010, British police arrested Jacek Jaskolski, a Polish school teacher and grandfather living in the United Kingdom.³⁴ He was being sought for an alleged theft on an EAW which related to an incident in 2000. He withdrew money from his bank account and subsequently went over his overdraft which he paid back. He then moved to the United Kingdom with his family.³⁵ There are two charges being brought against Mr Jaskolski:

1. The debt had now been paid off. He lost his job and tried to pay it back in instalments.
2. Accused of diminishing the value of the property when the bank repossessed to pay off the debts because he removed certain appliances in contravention to a court order dated 2002 he removed the items in 2001.

On the 20th of April 2011 Mr Jaskolski succeeded in his extradition hearing and he was

²⁸ O. POLLICINO: "European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems. *German Law Journal* 9 No. 10 (2008) 1313-1355.

²⁹ Andrew Symeou - Greece <http://tinyurl.com/c63cepm> (2012.07.02)

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ After a four year ordeal Andrew Symeou is Cleared, <http://tinyurl.com/433fnex> (2012. 07. 02)

³⁴ Jacek Jaskolski - Poland <http://tinyurl.com/bwoefxu1> (2012. 07. 02)

³⁵ Ibid.

discharged from his extradition to Poland. FTI argues that the EAW was originally created to counter serious crimes and to fight terrorism not to deal with small debts and this is a misuse of the instrument for something it was not intended to deal with.³⁶

A case closer to home is the case of Michael Turner a U.K. citizen who via a EAW was requested by the Hungarian authorities.³⁷ In Michael Turner's case there was no apparent decision to prosecute and from the period of November 2009 – December 2011 he was unaware of the real substance of the case being brought against him.³⁸ During this period he was held in pre trial detention for four months without any charge being brought against him.³⁹

It was only two years after he was originally extradited that the Hungarian authorities actually brought charges against him.⁴⁰ Since this Michael Turner has now appeared in Hungary once more for a hearing in February 2012 on the 29th in order to set a date for the eventual trial date.⁴¹

The domestic Hungarian legislation:

– The Fundamental Law of Hungary Article XXVIII:

'(3) Every person subject to prosecution shall have the right to legal defence at every stage of the trial. No counsel shall be made liable for his or her opinion expressed while providing legal defence.'⁴²

In Hungary, the legal provisions that are hailed as being the most effective find its form in the shape of a Roma legal aid support centre, which typically shows that the legal aid provisions are forgotten and are not perceived as being applicable to all sorts of cases where other might be in need of crucial support. Not the infrastructure in place to support those clients who seek out legal aid support, neither support for those lawyers who undertake legal aid work.

In addition to the infringements of human rights the EAW has also caused difficulties for member states when interpreting the Framework Decision. The Decision in the case of Pupino (Pupino) illustrates how the Framework Directive as been interpreted as well as its legal nature established.⁴³ It has been established that even though framework decisions may not have direct influence in the domestic legal systems that the Member States are required to take note of them and to interpret all national laws so far as it is possible to be in line with wording and overall nature of the Framework Decision.⁴⁴ A result of the Pupino case the principle of 'conforming interpretation' was coined. This principle is illustrative of the courts working to find the mutual recognition so that the domestic courts can interpret their legal provision in line with the framework decision as much as is possible in order to achieve its overall goals and aims.⁴⁵ This case is indicative of how the domestic courts can employ judicial discretion so as to achieve the aims of mutual trust and recognition.

As in the case of Andrew Symeou illustrates there is need for greater protection of fundamental

³⁶ Jacek Jaskolski summary <http://tinyurl.com/bwoefxu> (2012. 07. 02)

³⁷ <http://tinyurl.com/blv3eug> (2012. 07. 02)

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ <http://tinyurl.com/bw8vlym> (2012. 07. 02)

⁴¹ Ibid.

⁴² <http://tinyurl.com/7fsl4lk> (2012. 07. 02)

⁴³ Case C-105/03.

⁴⁴ Case C-105/03 see paras 19, 28-30, 36, 38 of the judgment

⁴⁵ Ibid.

rights in particular the provision of translation and legal/state aid. The EU in attempt to respond to this discrepancy has enacted its directive on interpretation and translation so as to continue to work towards the principles of mutual trust amongst the member states.⁴⁶ Both the Stockholm Programme and the Treaty of Lisbon will be instrumental in achieving these goals.

The Directive, PE-CONS 78/11: on the right to information in criminal proceedings, is one such step which will be instrumental in the achievement of these goals.⁴⁷

*Salduz v. Turkey*⁴⁸ was a fundamental and landmark case of the ECtHR where it was deciding that suspects at a police station should have and had the right to access a lawyer. „The Court found: „[I]n order for the right to a fair trial to remain sufficiently 'practical and effective' Article 6§ 1 [of the ECHR] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police.⁴⁹

The draft Directive in light of the *Salduz* case provides an opportunity for all of the Member States to develop their legislation and case law in line and in step with this ECtHR decision as well as in line and in step with each other.

This Directive is indeed a progressive step forwards in securing the right to counsel but however some Member States have already entered derogation from, to it talk about Article 82(2) from the handout and its importance with relation to the support of the European Council as well as the European Commission's Roadmap how it enshrines and further supports the goals of supporting and promoting minimum standards in criminal proceedings also it provides a lovely underpinning of these minimum standards on a Europe wide scale.

Article 3 (relates to the right of access to a lawyer in criminal proceedings) lays down the general principle that all suspected and accused persons in criminal proceedings should have access to a lawyer as soon as possible, in time and in a manner that allows them to exercise their defence rights. This reflects ECtHR jurisprudence, which has established that a suspect must be offered the assistance of a lawyer „already at the initial stages of police interrogation' and as soon as he is deprived of his liberty, irrespective of any questioning. Article 7 (relates to the confidentiality requirements) embodies the principle of the ECtHR which identifies one of the key factors to a lawyer's effective representation of a client's interests as the principle of protecting the confidentiality of information exchanged between them. It held that confidential communication with one's lawyer is protected by the ECHR as an important safeguard of one's right to defence.

These cases just highlights a few of the endemic problems with the system and how even though the Stockholm Programme and the Lisbon Treaty seek to foster an environment of mutual trust how in actual fact there is much work to be done if we want to see this become a reality.⁵⁰

What is of considerable and growing concern is for those vulnerable individuals who may slip through the gaps for example those people living with disabilities, youth and children, immigrants. In addition to these concerns what also applies across the board is that of the importance of the level of communication, that is available to people at the pre-trial and during the trial stages

⁴⁶ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings <http://tinyurl.com/cpl7q8r> (2012. 07. 02)

⁴⁷ <http://tinyurl.com/7gvhe63> (2012. 07. 02)

⁴⁸ Application no. 36391/02

⁴⁹ Ibid.

⁵⁰ B. NASCIBENE: "European judicial cooperation in criminal matters: what protection for individuals under the Lisbon Treaty?" *ERA Forum* 10 (2009) 397-407

themselves as this is indicative of what most people suffer when it comes to an infringement of their right to a fair trial.

The European Commission released a press release on the 7, June 2012 that there is now an EU wide right to information at arrest. This new law is one of the 6 directives that the Commission has undertaken to provide in a catalogue of attempts to redress the imbalance and injustices in the criminal procedural practices of the various Member States. Within this new law there is a provision for a 'Letter of Rights' which will set out and inform the detained or arrested person of the right to remain silent; to a lawyer; to be informed of the charge; to interpretation and translation in any language for those who do not understand the language of the proceedings; to be brought promptly before a court following arrest; to inform someone else about the arrest or detention.

One significant draw back of this is that the Member States are left with the discretion on how to format as well as formulate what the rights should be and how they should look in this „Letter of Rights”, as the Commission has proposed a model available in 22 EU languages. This again allows room for the Member States to adopt extremely divergent practices when it comes to the application of the rights of the persons who have been arrested and detained. It is regrettably that something which had great promise may prove to be nothing more than simply rubber stamping.

This latest directive of the European Commission is being hailed as a great breakthrough in the protection of the right to a fair trial but as with most things time will tell how the practice and theory of protecting human rights and fundamental freedoms match up in reality.

There have not all been positive reactions to the fact that the Charter now has become an authoritative law on human rights (but only when European Union law applies) in that some have voiced concerns over the fact that, 'the Charter will reduce levels of national control over domestic policies.'⁵¹ This debate is being fought between those who see the integration as well as the formalization of the Charter into EU law and that all of the Member States have to abide as well as adhere to it as a great opportunity to emphasize the importance of human rights. Whereas the other side this rather more as an added threat to the already impinging and encroaching arm of the European Union into domestic affairs.⁵²

This debate brings to the forefront and this debate also provides the basis for the supposition as well as hypothesis of this paper that the protection of human rights and fundamental freedoms is of increasing value and importance in today's criminal procedure.

In light of this debate the question of „more Europe” versus „less Europe” in the realms of peace and security in Europe and in the area of economic policy respectively.⁵³ As we know with the introduction of the Treaty of Lisbon in 2009 the ECHR became binding on all of the Member States. With this introduction, which has been hailed as a huge leap forwards in the furtherance of the support as well as protection of human right has brought with it the tension of respecting the EU principle of subsidiarity. The Charter itself states at Article 51 that the Charter does not establish any new power or task for the EU and reasserts the European notion of „subsidiarity”—a legal concept designed to preserve local and national decision making competences within the

⁵¹ WILKINS G. Richard – REED Marya: The Impact of the European Charter of Fundamental Rights And the Proposed EU Constitution On the Domestic Policies of EU Member States, *Proceedings of the EU Constitutional Convention* (2003) 1.

⁵² Ibid. 1-2.

⁵³ Ibid. 2.

European legal system.⁵⁴ It is inevitable that the Charter will in turn expand the control of the EU over certain significant as well as important social policies.⁵⁵ Whether or not this is something which is to be welcomed and beckoned in or to be resisted.⁵⁶

Indeed, as I have mentioned previously the EAW is based upon the principle of mutual recognition. This means that one State will only grant the EAW if the other State meets the Human Rights requirements. As such one State could reject the application of another State on the basis of it not compiling with Human Rights requirements enshrined in Article 6 of the Treaty of the European Union.

In turn these discrepancies and divergences when it comes to the application of law in criminal procedural and substantive matters does not lead to the fostering of mutual trust and judicial cooperation between the member states. This is has never been more so or more apparent than with the application of European Arrest Warrants (hereinafter referred to as the EAW). The EAW highlights the tensions that have been placed upon Member States by themselves and other Member States when countering the threats of terrorism.⁵⁷ It is through this mechanism that the already less than adequate criminal law issues have been brought to the fore. In addition to these inter Member State tensions when it comes to trusting the criminal system of another Member States to treat your national well, there is also the question of Bills and Laws that are currently being debated and or enacted in Member States that call into question their observance and their taking seriously of their human rights observance and obligations.⁵⁸ (As we have seen) the U.K. and Ireland have already stated that they will participate in the adoption and the application of the Directive on the right to information in criminal proceedings but that Denmark will not be bound by it. The current Commission proposal on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest the U.K. has taken the position that they will not be opting into that latest proposal this probably is in part to do with the fact that the U.K. is making current (extremely controversial) Bill, Ireland is also not opting in and the Netherlands, France and Belgium have all offered statements criticizing the protections contained within the (draft) Directive.

Thomas Hammarberg, the Commissioner for Human Rights issued a statement on the 15th of March 2011 directly addressing the use of European Arrest Warrants.⁵⁹ In his comment addressed, 'Overuse of the European Arrest Warrant – a threat to human rights', the Commissioner stated that

'Human rights organizations have expressed concerns about the imprisonment of innocent persons, disproportionate arrests, violations of procedural rights and the impossibility in some countries for an innocent person to appeal against a decision to be surrendered. The problems appear to have worsened with the increase of the number of EAWs – there are now an average of more than one thousand per month, the overwhelming majority of which relate to minor crimes.'⁶⁰

⁵⁴ Ibid. 3.

⁵⁵ Ibid. 3.

⁵⁶ Ibid. 3.

⁵⁷ B. BAPULY: "The European Arrest Warrant under Constitutional Attack". *Vienna Online J. on Int' Const. L.* 3 (2009) 4.

⁵⁸ C. WARBRICK: "The European Response to Terrorism in an Age of Human Rights". *European Journal of International Law* 15 (2004) 989-1018.

⁵⁹ Overuse of the European Arrest Warrant - A Threat to Human Rights <http://tinyurl.com/4qbx7n5> (2012. 07. 02.)

⁶⁰ Ibid.

There is greater need for protection of fundamental rights within the operation and the carrying out of EAW's this has been identified by the European Commission and they have enacted the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.⁶¹ This Directive is a response of the European Commission to its tasks under the Stockholm Programme to work towards fostering an environment of mutual trust in Europe. As in several cases the individual subject to an EAW is unaware of the charge brought against in addition to this they often do not understand the criminal proceedings that they are part of as there is inadequate interpretation available to them.

Europe is at a time when the free movement of people (immigration) is more possible but this means that steps should be taken (like the Stockholm Programme (initiative)) to ensure that justice beyond borders is really secured and this can only be achieved by the mutual trust of the member states in each others criminal justice systems. It is in this matter that the courts have the ability to be trailblazers in leading the way for the protection of all fundamental rights and freedoms for all peoples.

CHEESMAN SAMANTHA JOY

Európai bűnügyi perspektívák: a tisztességes eljáráshoz való jog (Összefoglaló)

Jelen tanulmány célja, hogy felvázolja a Lisszaboni Szerződés jelentőségét, a Stockholmi Programmal összefüggésben a tagállamok közötti kölcsönös elismerés és bizalom elveinek érvényesülésén. A tanulmány különös figyelmet fordít az európai elfogatóparancsra, illetve arra hogyan teszteli ez az intézmény a tagállamok közötti együttműködés határait.

A tanulmány azokkal a részletkérdésekkel is foglalkozik, amelyek a védőhöz való joggal, mint a tisztességes eljáráshoz való jog egyik alapelemével kapcsolatban merülnek fel. A védőhöz való jog támogatottsága az EU tagállamaiban jelentősen eltér. Erre tekintettel az EU irányelvet fogadott el a tolmácsoláshoz és fordításhoz való jogról a büntetőeljárásban, ami megteremtheti a védőhöz való jog alapjait is a tisztességes eljárás keretei között.

A tanulmány vizsgálja továbbá azokat az alkotmányos elméleteket, amelyek megalapozzák a jogállamiság és tisztességes eljárás szerepét egy demokratikus társadalom fejlesztésében. A releváns belső jogi rendelkezések mellett a tanulmány figyelmet fordít az Európai Emberi Jogi Egyezményre, valamint az Európai Alapjogi Charta 47. cikkére illetve arra, hogyan építették be a tagállamok a 6. Cikk (3) (c) bekezdését belső jogrendjükbe, és az új magyar Alaptörvény XXVI. 3. Cikk (3) bekezdésére, aminek értelmében a védőhöz való jogot az eljárás minden szakaszában biztosítani kell.

A tanulmány vizsgálja továbbá az Európai Emberi Jogi Bíróság legfontosabb releváns ítélezési gyakorlatát [Saldut v Törökország (Application No. 36301/02)], és azt, mennyiben tekinthetőek ezek a védőhöz való általános joghoz vezető út mérföldköveinek.

⁶¹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings <http://tinyurl.com/cpl7q8r> (2012. 07. 02.)